

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Bruce Levin)	
)	
vs.)	
)	
Novacon,LLC)	
)	04-0234
)	
In the matter of an Informal Complaint)	
Pursuant to the Illinois Administrative Code)	
Part 200 Rules of Practice Section 200.160)	
)	

**RESPONSE TO THE
MOTION TO DISMISS**

A pattern is being established by Applicant. First, in the name of Novacon LLC, it presented, on February 2, 2004, a petition to approve an interconnection agreement with Illinois Bell Telephone Company, in Docket 03-0750, without informing either Illinois Bell or the Commission that Novacon, LLC no longer holds a valid CLEC certification - Novacon, LLC having purported to have transferred its CLEC license to Applicant, Novacon Holdings, LLC, on January 10,2004. Next, Applicant filed a baseless objection to Levin's Petition to Intervene in Docket 04-0064, on the theory that, despite the truth of Levin's statements that Applicant was operating without a license, somehow the Commission shouldn't hear this because, alas, Levin was supposedly a *competitor* of the Applicant. This was of course baseless because Applicant is well aware that alleged competitors have time and again been granted standing to intervene in CLEC application proceedings before this Commission.

INTRODUCTION

Novacon, LLC suggests that the “issues” in the complaint are “being addressed in ICC Docket No. 04-0064”. Novacon, LLC has failed to mention, that in Docket 04-0064, it filed a **MOTION TO STRIKE** the Informal Complaint, which was attached to the Amended, Verified Reply of Bruce Levin to Novacon Holding, LLC’s Response to Petition for Leave to Intervene.

Novacon, LLC argued in ICC Docket No. 04-0064, “ All right. Motion to strike – the essence of the motion to strike is, we don't believe that the matters discussed in the complaint are appropriate for discussion in this case. The main thing we're attempting to strike was the discussion of those matters and the draft complaint itself that had been attached to the response of Bruce Levin to our objection to intervene.”¹, “If they want to do something separate in the future, they have the right, you know, to knock themselves out. But we shouldn't be prejudiced by getting our application in this case. I see this as highly unfair. And if we want to discuss matters that you see are relevant, you know, we'll deal with that.”², “If there is a complaint -- a late violation, I'm sure you have an enforcement arm of this agency. I headed up an enforcement arm for eight years doing airline deregulation, okay?”³ This argument is absurd, of course, because the violations addressed in this complaint are not and have not been addressed thus far by the Commission in any Docket. Novacon LLC’s motion was granted.

Section 4-201 of the PUA, in part reads:

¹ 04-0064 Novacon LLC Counsel, Hearing, March 8, 2004, page 13, lines 12-19

² 04-0064 Novacon LLC Counsel, Hearing, March 8, 2004, page 16, lines 11-17

³ 04-0064 Novacon LLC Counsel, Hearing, March 1, 2004, page 22, lines 11-14

“It is hereby made the duty of the Commission to see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, **and that violations thereof are promptly prosecuted**”

The Commission was first made aware of many of the violations January 26, 2004 in Docket 03-0570 and subsequently in Docket 04-0064.

LEGAL STANDARD

Novacon, LLC faces significant legal hurdles in order to succeed in a Motion to Dismiss. The rules of the Illinois Commerce Commission incorporate the Code of Civil Procedure regarding motions to dismiss found at 735 ILCS 5/2-615. *See*, 735 ILCS 5/1-108(b). In deciding a motion to dismiss, the court or agency must accept all facts pleaded as true and indulge all reasonable inferences in favor of the plaintiff. *Sunderland v. Illinois Bell Co.*, 254 Ill. App. 3d 983, 988 (1983); *Katz v. Belmont National Bank*, 112 Ill. 2d 64, 67 (1986). All facts alleged in the complaint are taken as true, as well as all reasonable inferences that can be drawn therefrom. *Long v. New Boston*, 91 Ill. 2d 456, 463, 440 N.E.2d 625 (1982); *Sherman v. Kraft General Foods, Inc.*, 272 Ill. App. 3d 833, 835, 651 N.E.2d 708, 710, 209 Ill. Dec. 530 (1995). A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiffs to recover. *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill. 2d 278, 286, 499 N.E.2d 1319 (1986).

ARGUMENT

Mr. Levin does not have standing.

Novacon, LLC, in its Motion to Dismiss, states that Mr. Levin does not have standing under Section 10-108 and states “Nothing in the Public Utilities Act or case law provides standing to an owner of a public utility”

Contrast this unreasonably narrow view with the far broader construct in the Illinois Act:

Complaints; notice; parties. Complaint may be made by the Commission, of its own motion or by **any person** or corporation, chamber of commerce, board of trade, or any industrial, commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission. In the discretion of the Commission, matters presented by one complaint may be ordered separated, and matters upon which complaint may be founded may be joined. No objection shall be sustained to a separation merely because the matters separated are under the ownership, control or management of the same persons or corporation. **No complaint shall be dismissed because of the absence of direct damage to the complainant.**

None of the Counts Alleged Constitute a Violation of the Public Utilities Act.

Count II contends that: On January 10, 2004, Novacon, LLC’s alleged Manager, Mr. Kurt Scholle, purportedly caused Novacon, LLC to transfer all of the assets of Novacon, LLC, except cash, but including its Customer Contracts, to Novacon Holdings, LLC. The abandonment of customers, and subsequent transfer customers to the unlicensed carrier, Novacon Holdings, LLC violates Section 13-406 of the PUA.

Section 13-406 of the PUA, in part reads:

“No telecommunications carrier offering or providing competitive telecommunications service shall discontinue or abandon such service once initiated except upon 30 days notice to the Commission and affected customers.”

In their Motion to Dismiss, Novacon, LLC has interpreted Section 13-406 to mean that a telecommunications provider can discontinue or abandon service to customers without giving 30 days notice to the Commission or affected customers, as long as service is not interrupted during the transfer to the new provider. They have interpreted this to include customers transferred to an unlicensed telecommunications provider.

It is well established that the interpretation or construction of statutes is a question of law, to be decided by the court or tribunal. *See, e.g., Matsuda v. Cook County Employees and Officers Annuity and Benefit Fund*, 178 Ill. 2d 360, 364; 687 N.E. 2d 866 (1997); *Bruso v. Alexian Brothers Hospital*, 178 Ill. 2d 445, 452; 687 N.E. 2d 1014 (1997); *Branson v. Dept. of Revenue*, 168 Ill. 2d 247, 254; 659 N.E. 2d 961. The primary rule of statutory construction is to give effect to the legislature's intent in enacting the statute. *Bruso*, 178 Ill. 2d at 451. legislative intent should be sought primarily from the language of the statute, *People v. Beam*, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5th Dist. 1977), since the language of the statute is the best evidence of legislative intent, *Bruso* at 451, and provides the best means of deciphering it. *Matsuda*, 178 Ill. 2d at 365. Accordingly, the best way to determine what the General Assembly meant is to look at what it said.

Such an analysis is fatal to Novacon LLC's position. The Commission cannot narrow the scope of a lawful enactment of the General Assembly. It is clear that a court or tribunal must construe a statute as it is, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute's application, regardless of its opinion regarding the desirability of the results of the statute's operation. *Toys "R" Us v. Adelman*, 215 Ill. App. 3d 561, 568; 574 N.E. 2d 1328 (3rd Dist. 1991); *cf. Thornton v. Mono Mfg. Co.*, 99 Ill. App. 3d 722, 425 N.E. 2d 522 (2nd Dist. 1981) (in determining that application of

statute of limitations barring minor's products liability claim was proper, if perhaps harsh, court observed that, where statute is clear, only legitimate role of court is to enforce the statute as enacted by legislature); *People ex rel. Racing Bd. v. Blackhawk Racing*, 78 Ill. App. 3d 260, 397 N.E. 2d 134 (1st Dist. 1979) (court observed that, though the General Assembly could have enacted a statute more effective in accomplishing its purpose than the one it did enact, the court was not permitted to rewrite the statute to remedy this defect).

Count II contends that: Mr. James M. Reninger, CPA (Member and "Tax Matters" Partner of Novacon, LLC, former Manager of Novacon, LLC, and Partner of Whitfield & Reninger, Ltd., located at 1895 Rohlwing Rd Rolling Meadows, IL 60008.) knowingly overstated revenues by misclassifying customer deposits as assets.

Novacon, LLC, in its Motion to Dismiss, states "Mr. Levin has not alleged that any person "willfully" made false entry in Novacon, LLC's accounts." Mr. Reninger's actions were willful and therefore constitute a violation of Section 13-406 of the PUA.

The Complaint Fails To Request Relief That Can Be Granted By The Commission.

Novacon, LLC, in its Motion to Dismiss, states: "Mr. Levin's request must be dismissed for lack of jurisdiction." "Mr. Levin does not allege that Novacon, LLC has violated any section of the Act". Section 4-101 of the PUA states:

The Commerce Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine those public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the

manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with this Act and any other law, with the orders of the Commission and with the charter and franchise requirements.

Novacon, LLC, in its Motion to Dismiss, states: “The only substantive relief requested is that the Commission exercise its authority under Section 4-501 of the Act to issue a petition for receivership of Novacon LLC. None of the allegations in the Complaint, however, meet the criteria set out in that section for initiating receivership actions.”

That statement is blatantly false. As of January 10, 2004, when Novacon, LLC’s alleged manager, Mr. Kurt Scholle, purportedly caused Novacon, LLC to transfer all of the assets, except cash, but including its Customer Contracts, to Novacon Holdings, LLC, Novacon, LLC:

- (1) is unable or unwilling to provide safe, adequate, or reliable service;
- (2) no longer possesses sufficient technical, financial, or managerial resources and abilities to provide safe, adequate, or reliable service;
- (3) has been actually or effectively abandoned by its owners or operators;

Novacon, LLC, in its Motion to Dismiss, goes on to state: “None of those criteria are met here or even alleged in the Complaint. Even if they were alleged and proven to be true, the establishment of a receivership would be a useless action because Novacon, LLC has no customers or assets and its former customers are currently being served by Novacon Holdings, LLC”. Pursuant to Section 4-501(f) of the PUA:

If the receiver determines that the public utility's or telecommunications carrier's actions that caused it to be placed under the control and responsibility of the receiver were due to misappropriation or wrongful diversion of the assets or income of the company or to other misconduct by a director, officer, or manager of the company, the receiver shall file a petition with the circuit court that issued the order of receivership for an order that the director, officer, or manager be ordered to pay compensatory damages to the company because of the misappropriation, diversion, or misconduct.

Pursuant to Section 4-501(h) of the PUA:

The appointment of a receiver shall be in addition to any other remedies provided by law.

Inaccurate Factual Statements

Several of the statements made by Novacon, LLC in the Motion to Dismiss are factually inaccurate, including, “Mr. Levin fails to note that he provided none of money invested in the company, ether as equity or as loans. All funding was provided by other equity holders. For that reason, Novacon LLC’s operating agreement provided that decisions require a 2/3 majority of the individual members, of whom Mr. Levin was only a single member.”

The statement is factually wrong for several reasons however to keep this brief I will list just a few:

- 1.) Novacon, LLC’s operating agreement has different voting requirements throughout the agreement. In multipliable instances two-thirds of Voting Membership Units are required;
- 2.) Mr. Levin loaned money to Novacon LLC;
- 3.) Mr. Levin contributed capital to Novacon LLC.

Section 200.160 Informal Complaints

Section 200.160 States:

An informal complaint may be presented orally or in writing and shall contain a concise statement of the facts involved, the specific relief requested, and the name, address and telephone number of the complaining person and each person against whom complaint is made. Such complaints will not be docketed and will not initiate a formal proceeding. The Commission acting through its staff will investigate and attempt to resolve informal complaints without formal action. The presentation of an informal complaint shall be without prejudice to the right to file a formal complaint. Nothing in this Section shall prohibit the Commission from proceeding on its own motion on the basis of an informal complaint.

The complaint was filed as an Informal Complaint so that staff would investigate and take appropriate action under Section 4-201 of the PUA. If staff finds that Count II has validity then I believe notification to the Attorney General would be appropriate as Count II is a Class A misdemeanor.

WHEREFORE, Bruce Levin requests Applicant's Motion to Dismiss be denied and that the Commission award such other relief as it deems just.

Respectfully submitted,

By: 

Bruce Levin
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Dated: April 6, 2004

VERIFICATION

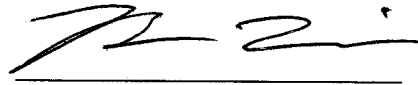
STATE OF ILLINOIS

COUNTY OF LAKE

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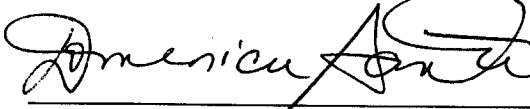
04-0234

Bruce Levin, being duly sworn upon oath, deposes and states that he has read the foregoing Response to the Motion to Dismiss and knows the contents thereof; and that to the best of his knowledge, information, and belief, maintains that the contents of this document is true and correct.

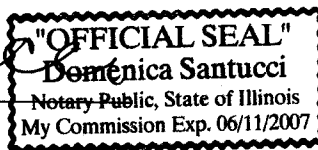


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SUBSCRIBED and SWORN to
Before me this 6th day of April, 2004



Notary Public



04-0234

Bruce Levin

vs.

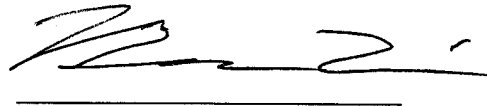
Novacon, LLC

In the matter of a **INFORMAL** Complaint
Pursuant to the Illinois Administrative Code
Part 200 Rules of Practice Section 200.160

04-0234

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Bruce Levin's Response to the Motion to Dismiss has been served upon the parties listed on the attached service list on this 6th day of April, 2004, by E-mail.



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